DOCKET NO. KNLCV-12-6018984S | SUPERIOR COURT

LBI INCORPORATED | JUDICIAL DISTRICT OF NEW LONDON

VS | AT NEW LONDON

SPARKS, JARED, ET AL | JANUARY 4, 2016

SUPPLEMENTAL ORDER RE:

MOTION FOR ELECTRONIC DISCOVERY #151

In his preliminary ruling on the motion of the defendant, Charles River Analytics (CRA) (hereinafter referred to as the "defendant"), for an order preventing the plaintiff, LBI, Inc.,(hereinafter referred to as the "plaintiff") from misusing electronic discovery in violation of P.B. § 13-5, Judge Zemetis deferred issuing a final order pending determination of whether the requested documents were "reasonably accessible", and, if not, whether cost shifting should be required for their production.

The parties have responded to his request for evidence and argument regarding accessibility with affidavits and briefs. See filings # 199 and # 200. The court has reviewed the briefs and affidavits in light of applicable case law, particularly *Zubulake v. UBS Warburg LLC*, 216 FRD 280 (SDNY 2003) a/k/a Zubulake I" and its progeny, notably *Zubulake v. UBS Warburg LLC,* 217 FRD 309 (SDNY 2003), a/k/a "Zubulake III", as well as Connecticut Practice Book § 13-5(9).

151.03

1/4/16 copies sent to counsel/parties of record

With two exceptions noted below, the court finds that the documents requested are reasonably accessible and should be produced by the defendant without cost shifting. The defendant, citing a series of cases, claims that due to its lack of an adequate search engine, it does not have the ability to review and sort the requested documents and must retain a private contractor to perform that task. On the basis of that expense, it argues that the documents should be deemed "inaccessible."

However, the cases cited by the defendant do not hold that the need to hire a private contractor necessarily renders the documents "inaccessible" as a matter of law. The defendant relies on *Capital Records, Inc. V. MP3Tunes, LLC*, 261 FRD 44 (SDNY 2009), but in that case the parties were arguing over the range of files to be produced, and the court limited the request and did not impose cost shifting. The defendant also cites *Couch v. Wan,* 2011 WL 297118 (ED Cal 2011) in which a magistrate found that the cost of production was excessive given the amount in controversy, and the court held that the magistrate's order was not clearly erroneous. In *Moody v. Aircastle Advisor, LLC,* 2014 WL 1761736 (D Conn. 20014), another case cited, the parties originally agreed to production of documents costing $90,010, but the moving party later requested additional documents costing $10,500 to produce, and the court granted that request, but conditioned it on cost shifting. The defendant further cites *Connecticut General Life Ins. Co. v. Earl Scheib, Inc.*, 2013 WL 485846 (SD Cal. 2013), but in that case, after determining that the cost of discovery would exceed the judgment being sought, the court limited the discovery, allowing the moving party to proceed with further discovery if it bore the cost. Similarly in *Barrera v. Boughton,* 2010 WL 3926070 (D. Conn. 2010), another case

relied on by the defendant, the court approved a "phased" production of electronic records and denied cost shifting. And in *W.E. Aubuchon C. v. BeneFirst, LLC*, 245 FRD 38 (D. Mass 2007), the defendant had ceased doing business, and the court, therefore, found it necessary to impose some cost shifting.

None of these cases overturns or erodes the holding in Zubulake I that, to require cost shifting, the information requested usually must be deemed to be "inaccessible information deemed accessible is stored in a readily usable format. Although the time it takes to actually access the data ranges...the data does not need to be restored or otherwise manipulated to be usable." Id. In this case, the defendant concedes that most of the data requested is accessible without manipulation. The defendant apparently needs to retain a contractor with a sufficient search engine to identify and categorize the relevant documents, but with the exception of the two issues discussed below, the data is in accessible form.

The defendant argues that even if the documents are accessible, the cost of producing them outweighs their potential benefit, and, therefore, they should be deemed "inaccessible." However, given that the plaintiff alleges that the contract at issue in this case is worth $4.5 million, the discovery costs imposed on the defendant, as set forth in its brief, do not appear to be sufficiently disproportionate to the amount at controversy as to require cost shifting. See Zubalake III, supra. Further, the defendant does not claim a lack of the monetary resources to finance the search. Id. And the defendant has a significant interest in performing the work in a manner which controls costs. Id. Accordingly, subject to the two exceptions discussed below, the defendant's objection to the

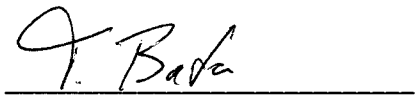
production of documents is denied, and the defendant is ordered to produce the documents as soon as practical without cost shifting. See P.B. § 13-5(g).

Further, the request of the defendant that discovery of the documents should be limited to documents created prior to the expiration of the individual defendants' non-compete clauses is denied. If the individual defendants violated their non-compete agreements, the damages relating to such violations could well extend long beyond the expiration date of the contract and are legitimate grounds for discovery.

The defendant has identified two instances where the electronically stored data appears to be inaccessible. First, it notes in footnote 1 of its brief that certain attachment files are composed of software codes and formats other than Word, Excel, Outlook, etc., and that these files need to be "culled", separately recoded and restored before they can be searched and disclosed. These files are, therefore, inaccessible and subject to cost shifting. Id. Further, the defendant reports that some documents are simply not searchable in their present form and need to be converted to searchable format before they can be evaluated to determine if they are subject to disclosure. These files are also inaccessible and subject to cost shifting. Id. See Affidavit of Lynn S. Turgeon, 9/30/15.

As to these two sets of documents, the court orders the parties to consult with each other regarding the number of documents involved, their potential relevancy, and the cost of converting them into an accessible format. The parties might consider jointly retaining an independent expert (who in this case may require a security clearance) to sample the files and advise the parties as to their

relevancy. The parties should report back to the court within 30 days of the issuance of this opinion regarding their discussions and recommendations regarding how to proceed with disclosing these two sets of documents. If the parties have not arrived at a discovery protocol and cost shifting agreement by that time, they should inform the court, and this matter will be set down for a hearing. In the meantime, the defendant will produce the "accessible" documents as ordered above.



Bates, J.